



**Business Law Reform and  
Alternative Dispute Resolution  
Development**

Under the USAID/Madagascar Legal, Regulatory and  
Judicial Reform Activity  
USAID Contract No.: 623-C-00-98-00029-00

**Scope of Work No. 12  
BACKGROUND REPORT  
ON  
THE REVISION OF THE MADAGASCAR LABOR CODE**

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**CLIN 001-4**

**October 19, 1999**

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**October 19, 1999**

**Submitted to:**

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The Ministry of Civil Service, Labor and Social Laws, in 1998, initiated a project to reform the Madagascar Labor Code. Among the reasons stated were that the Labor Code of 1994 had not adequately involved participation by the social partners – the nation’s principal employer and labor union representatives. Moreover, reform of the code, especially in the view of the employer organizations, is important in order to make it conducive to free market economic conditions and the encouragement of increased direct foreign investment. In this connection, the Ministry received technical assistance from ARD/Checchi and the ILO (International Labor Organization).

Two tripartite national workshops on the Labor Code were conducted in Antananarivo, the first in November, 1998, and the second in April, 1999.<sup>1</sup> The ARD/Checchi consultant, Don Zimmerman, and the ILO consultant, Jean-Marc Béraud (of the University of Lyon), participated in the second workshop, and continued their consultation and technical assistance from time to time until October, 1999. Collaborating with Mr. Zimmerman has been the national consultant, Mboara Andrianarimanana, (of JURECO Etudes et Conseils S.A., an ARD/Checchi subcontractor)

Mr. Zimmerman submitted an Interim Report to USAID on June 10, 1999, when he completed Phase I of his consultation. At the same time, he submitted to the Labor Ministry and USAID a technical report, as requested by the Ministry, on various aspects of U.S. labor and employment laws and current practices (Rapport sur le système américain du Droit du Travail, June, 1999). This background report pertains to the subsequent events and activities during Phase II of his consultation through October 19, 1999, to which is attached his technical report concerning the draft of the proposed code revision compiled by the Ministry’s Drafting Committee (Avant-Projet de Code du Travail) in August, 1999 (referred to hereinafter as the “Code du Travail,” or the “Code”). The technical report also addresses certain aspects of the report by the ILO Consultant (MÉMORANDUM TECHNIQUE AU GOUVERNEMENT DE LA RÉPUBLIQUE DE MADAGASCAR CONCERNANT LA RÉVISION DE LA LÉGISLATION DU TRAVAIL), which contains his alternative code revision, submitted to the Ministry in July, 1999 (referred to hereinafter as the “Béraud Report”).

The Ministry originally requested that Mr. Zimmerman’s Phase II consultation commence in July, but then postponed his arrival until September 18, 1999. Immediately thereafter, the Ministry confirmed to him its intention that his Phase II consultation be centered on the proceedings of the general assembly of the tripartite Conseil National de l’Emploi (CNE). Since at least the time of the second workshop, the review of the Code by the CNE, which was to be followed by further Code redrafting in light of its recommendations, had been viewed by the Ministry as a key step prior to submission of the Code to the Assembly.

The CNE proceedings were scheduled to take place during the week of September 27. However, at the outset of the initial CNE meeting, the employer and labor organization members

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<sup>1</sup> The Labor Ministry also conducted a previous series of workshops, related, in significant part, to various provisions of the Labor Code concerning the representation of workers by labor organizations, and the status of collective bargaining, in Madagascar (Atelier sur la promotion de la négociation collective, Antananarivo, Fianarantsoa, and Mahajanga, July, 1998).

(two-thirds of the “social partners”) announced their boycott of the CNE proceedings, refusing to meet with the government’s appointed members (representatives of the Labor and other Ministries). The publically stated cause of their boycott, which continues as of the date of this background report, is their objection to two decrees issued by the Labor Ministry.<sup>2</sup>

The first, issued on August 20, 1999 (Décret No. 99-673), restructures the Board of Directors (Conseil d’Administration) of the Ministry’s social welfare bureau, Caisse Nationale de Prévoyance Sociale, (CNaPS). This Board of Directors, by pre-existing decrees, and as restated in the new decree, is given management responsibility for CNaPS. As in the case of the closely related CNE, the Board of Directors is a tripartite organization which has been comprised of equal members representing the government, employer organizations, and labor organizations. Although the decree’s restructured Board would remain tripartite in form, it appears, and is firmly perceived by the social partners (i.e., the employer and labor organization members), to wrest effective control of CNaPS from them and vest it entirely in the government’s appointed members.

The second (Décret No. 99-701) was issued on September 23, 1999. It was this decree, which names the individuals who are to comprise the restructured Council, that triggered the boycott by the CNE’s employer and labor partners. Along with newspaper advertisements denouncing the unilateral decision of the Ministry and its disregard for tripartism and social dialog, and announcing their boycott of all CNE proceedings, including the Labor Code review meetings, the major employer and labor organizations appealed for support to the ILO.

The impasse between the government and the other social partners not only caused the abrupt suspension of the long planned CNE consideration of Labor Code reform, which had been central to the reform process and to the role of both the USAID and ILO technical consultants. It called into question their continuing participation in subsequent stages of the code reform process, including direct assistance to the Ministry’s scheduled meeting of its Drafting Committee during the week of October 4.

More significantly, based on private meetings with key representatives of both employers and labor unions, during Phase I and during Phase II, it is evident that the current impasse is but a further manifestation of the deep and long standing distrust of the Labor Ministry, and of the Administration generally, by employers and labor organizations. Without their active and continuing participation in Labor Code reform, little real progress can be expected. First, there is the matter of the need for substantive input into the drafting of the code itself. Second, is their participation in steps to reform the Ministry’s administration and enforcement of the code, and their sustained pressure, to bring it about over the long term. The second is by far the more important, and, to a large extent, is beyond the purview of the code itself, no matter how much it might be improved from a technical drafting standpoint.

Formal sector enterprises appear quite ambivalent about the potential for meaningful Labor Code reform. On the one hand, many deem the Labor Code, and the Ministry’s role in it,

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<sup>2</sup> These decrees, however, have not been promulgated. Thus, although they appear to represent the specific intention of the Ministry of Labor, their actual promulgation remains uncertain.

as ineffective and largely irrelevant. They view its terms as widely unknown and ignored by both employers and workers, and see its sporadic enforcement as little more than an irritant, with penalties for violations being so insignificant as to create little or no incentive to become aware of the code's requirements, and much less to abide by them. For these reasons, they are quite reluctant to invest in a reform effort in which they have little or no confidence.

On the other hand, these same parties often couple their dismay and skepticism with insistence that reform is essential. On this side of the fence, they profess serious concern that the current archaic Labor Code is a major impediment to economic development. Moreover, many employers want the law to "level the playing field." By that they mean that those who flout the law receive an unfair competitive advantage against responsible employers. Thus, when asked their views on Labor Code reform, the typical response is that the overarching problem is the code's weak and ineffective (and many add, corrupt) administration and enforcement, coupled with the related need to simplify it and make it known by employers and workers, and their representatives. They then cite the need to make it more conducive to private sector economic conditions and an inducement to greater investment, as the prerequisite to more employment opportunities and reduced poverty. Also noted is the absence of any labor Labor Code provisions that address the many difficult work force issues now frustrating the government's privatization process.

It is against this background, as well as the public boycott of the CNE, that the ILO and USAID jointly reviewed the situation and decided to confront the Ministry with the dilemma it had created. They held a joint meeting with the Minister on October 4, 1999, which yielded no evidence or expectation of steps to restore dialog with the social partners. USAID and the ILO concluded that progress on Labor Code reform had been stymied, and that further participation in the Ministry's internal process, without participation by employers and worker representatives, could appear to be an abandonment of neutrality among the tripartite partners. Consequently, they decided to withdraw their consultants from participation in the scheduled meetings of the Ministry's Drafting Committee, and that future participation would depend on a satisfactory resolution of the CNE impasse.

Anticipating that prospect, there remains the matter of devising technical assistance in a manner that will be supportive of the reform process whenever it resumes. The truncated Phase II period afforded an opportunity, largely absent in Phase I, for technical collaboration between Zimmerman and Béraud. Despite having backgrounds in rather disparate labor law systems, there is considerable unanimity on the most critical objectives of Labor Code reform in Madagascar, even if somewhat less commonality on the most effective means of reaching them.

There also is a significant disparity in approach. The Béraud report constitutes an entire, detailed, substitute for Madagascar's code, intended both as to the existing code in force, as well as the proposed revision compiled by the Ministry's Drafting Committee. It is unquestionably a technically and substantively superior draft in many respects, particularly in light of the Drafting Committee's product. The latter is quite deficient from a drafting standpoint, containing many provisions that are incomplete, confusing, and some that are self-contradictory, leading to the observation that an able final editor was nowhere to be found. Worse, it offers virtually no reforms that address the labor market and work force needs of an emerging free market,

competitive economy, the abysmal state of labor union representation and collective bargaining, or the need to incorporate more effective provisions for worker protection. Nor does it contain provisions to improve enforcement, such as more clearly defined procedures, and a specified ranges of penalties rationally related to the nature of the violation, and which, not incidentally, would reduce opportunities for corruption.

However, the Ministry's resistance to accept a complete substitute draft code from abroad, or even major portions of one, is readily apparent. The proposed substitute was not even distributed in advance to the CNE members prior to the start of their scheduled proceedings, nor even to the members of its own Drafting Committee. As such, there is no plan to produce a new, detailed joint substitute by the ARD/Checchi and ILO consultants.

Instead, the attached technical report attempts to address only certain key issues for Labor Code reform, and to do so briefly, in nontechnical language. Reference is made, however, to certain provisions in the proposed Béraud substitute, where they reflect a joint recommendation. Should the Ministry, once having restored CNE tripartite collaboration in a manner satisfactory to each of the parties, wish further technical assistance in converting the points addressed into legislative form, consideration can be given to providing such consultation. There may well be an opportunity at that time, as part of such consultation, also to offer assistance in improving the quality, clarity and consistency of the Drafting Committee's product.

The technical report is intended to be an integral part of this background report to USAID, reflecting more of the Phase II work. It is also intended, however, to stand as a separate document and to address the subject of Labor Code reform in a manner that will be suitable for submission to the Labor Ministry, and perhaps others, without incurring resistance by being perceived as attempting to subvert Malagasy legislative authority in favor of foreign authorities.<sup>3</sup>

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<sup>3</sup> Translation of the technical report, which is necessary for key officials of the Labor Ministry, will follow shortly after the submission to USAID of the English text. USAID will submit the French version to the Ministry, with the suggestion that it also be transmitted to the major employer and labor organizations.

## Statement of Work

The following is a summary report on the tasks included in Statement of Work (#12). As noted above, the unexpected and sudden CNE boycott resulted in a suspension of participation the Code reform process and necessarily prevented the completion certain tasks.

a) General assistance in the Code reform process in light of (i) the first and second workshops; (ii) the ILO Conventions ratified by Madagascar, and (iii) work force developments related to the growth of export processing zone enterprises and to privatization.

Completed: The full reports of the first and second workshops, as prepared by the Labor Ministry, were reviewed and taken into account. All ILO Conventions ratified by Madagascar were reviewed, as were published ILO commentaries on the degree of compliance by Madagascar with certain of these Conventions. Various reports concerning export processing zone enterprise growth, and growth resulting from the privatization of state enterprises, as well as other private sector growth factors, were reviewed and taken into account in the technical reports (neither of which address, or make any recommendations, with respect to preferential treatment of export processing zone enterprises).

(b) Participate in the analysis and integration of the CNE observations on the Code du Travail.

Not Completed: The CNE boycott precluded any CNE observations on the Code.

(c) Review and analyze documents prepared by the Drafting Committee, and those prepared by the ILO expert.

Completed: All documents of the Drafting Committee, primarily consisting of the Projet de Code du Travail, as furnished by the Labor Ministry, were reviewed and analyzed. Same for the Béraud report, supplemented by several technical discussions with Professor Béraud.

(d) Provide expert technical assistance after the Drafting Committee's final draft is submitted to competent authorities.

Not Completed: The final draft was not completed due to the CNE boycott.

(e) Participate with the national consultant in the compilation and review of the implementing regulations, and in revising them, as a result of enactment of the new Code du Travail. Participation by the national consultant in the translation and related activities related to the new regulations, and in training of the Ministry's inspectors.

Partially Completed: Certain of the existing regulations were reviewed, but the CNE boycott precluded any further activity on them, or on inspector training.

(f) Consult as necessary with the Ministry's technicians, and with representatives of private sector enterprises and labor organizations.

Completed: Held meetings with:

- Ministry staff, including Directeur du Travail, Mme. Lea Razafimahazo; Inspecteur du Travail et des Lois Sociales, Lauréat Rasolofoniainarison; and Chef de Service des Relations Professionels, Paul Maximim Darson

- Employer associations and with managers of private sector enterprises, including (partial list)

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Oskar Slingerland representative of Jovenna, based in Mowbray, SA (a Solima purchaser)

Rakotovao Andrianomenjanahary, EMT, Engineering Maintenance & Technology, Siege: SIAG 10 Ambondrona, Ambodifilao 22 258 11, fax 22 304 91

- Labor organizations, including

David André Silamo, Secretaire Général du Sendika Kristianina Malagasy (SEKRIMA)

George Odon Raveloson, Directeur Gérant, Conseiller, Conseil National  
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22.305.15

(g) Interpret the first technical report, and prepare a supplementary technical report.

Completed: Aspects of the first technical report were discussed with Ministry staff, and the supplementary technical report is attached.

(h) Assistance is to be provided by a local expert.

Completed: Assistance and collaboration provided by ARD/Checchi consultant Mboara Andrianarimanana, retained by ARD/Checchi through of JURECO Etudes et Conseils S.A.